No. 09-1088

IN THE SUPREME COURT OF THE UNITED STATES

VINCENT CULLEN, JR., Acting Warden,
California State Prison at San Quentin, Petitioner,

v.

SCOTT LYNN PINHOLSTER, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, by his undersigned counsel, asks leave to file the attached opposition to petition for writ of certiorari without prepayment of costs and to proceed in forma pauperis. The Respondent was represent by counsel appointed by the Ninth Circuit Court of Appeal under the Criminal Justice Act, 18 U.S.C. § 3006A(b).

This motion is brought pursuant to Rule 39.1 of the Rules of the Supreme Court of the United States.

Respectfully submitted,

DATED: May 12, 2010

SEAN K. KENNEDY
Federal Public Defender
Counsel for Respondent
Counsel of Record

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BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI; RESPONDENT'S APPENDIX

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether a federal court may grant relief under 28 U.S.C. § 2254(d) based, in part, on evidence developed during an evidentiary hearing permitted by *Michael Williams v. Taylor* and § 2254(e)(2)?

2. Did trial counsel who announced at the guilt verdicts that they had "done nothing to prepare mitigation," declined an offered continuance and then worked only 6.5 hours to prepare and present one witness, whose testimony was harmful, render ineffective assistance at penalty?

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Scott Lynn Pinholster respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 590 F.3d 651 (9th Cir. 2009).

INTRODUCTION

The State fabricates "cert. worthiness" with two Questions Presented that have nothing to do with the Ninth Circuit's fact-bound and unremarkable decision.

First, the Attorney General asks if a federal court can decide AEDPA unreasonableness based upon facts "the petitioner could have presented to the state court but did not." This loaded question completely misrepresents what actually happened in this case. The State denied Pinholster any opportunity to develop the factual predicate for his claim in state court. The Ninth Circuit held that Pinholster sought an evidentiary hearing in state court but was denied all opportunity to develop the facts. The lack of fact finding in state court is attributable only to the State, not to Pinholster.

Thus, the first Question Presented is built on a false premise. What the Ninth Circuit actually said is that "if the evidence is admissible under *Michael Williams* [*v. Taylor*, 529 U.S. 420 (2000)] or § 2254(e)(2), and if it does not render petitioner's claim unexhausted under *Vasquez* [*v. Hillery*, 474 U.S. 254 (1986)],

then it is properly considered in evaluating whether a legal conclusion reached by the state habeas court was reasonable application of Supreme Court law." (App. at 32.) This is a correct statement of the law in every circuit.

The State's second Question Presented is equally misleading. The Attorney General asks if trial counsel were ineffective "because" they "did not seek out a different psychiatrist and different family members" to obtain a different mitigation case from the one they presented through the petitioner's mother alone.

But this is not why the Ninth Circuit concluded that trial counsel's representation in this case was ineffective. The actual basis was that trial counsel were caught unaware and were completely unprepared for the penalty phase:

> Trial counsel completely failed to discharge their responsibility to conduct the investigation required under *Strickland*. One week before the penalty hearing, counsel told the judge that they "did not prepare a case in mitigation because they felt there would be no penalty phase hearing." Notwithstanding counsel's admission, they inexplicably declined to request a continuance--even though the judge indicated he would readily grant one--because they did not believe the extra time "would make a great deal of difference.

(App. at 39.)

Trial counsel's entire preparation for the penalty hearing "lasted less than an average workday [6.5 hours]" and "counsel interviewed and presented just one witness, whose testimony was not only misleading, but also self-serving and harmful to Pinholster's defense." (App. at 42.)

Counsel's actions were not the result of a reasonable strategic decision but instead were based upon their mistaken belief "that there would be no penalty phase at all." (App. at 42.) Counsel had "conducted no investigation into Pinholster's background at all, aside from interviewing his mother." (App. at 45.) After the guilt phase and as soon as trial counsel's erroneous interpretation of procedural law came to light, the trial judge informed counsel that there would be a penalty phase and offered them a continuance to remedy their mistake. (App. at 42.)

Abundant records documented the prepubescent onset of epileptic seizures and damage resulting from Pinholster's early childhood car accidents, head trauma, and physical abuse. These records would have been readily available to trial counsel given any amount of investigation. But shocked by their sudden realization of an inevitable penalty phase, trial counsel resigned to a loss by unreasonably refusing the trial judge's offer to continue the penalty phase for further investigation. Findings of ineffective assistance based on errors of this

magnitude are not limited to the Ninth Circuit but rather are consistent with this Court's case law and the law in other circuits.

The Attorney General's disparagement of the Ninth Circuit's en banc decision is baseless. For example, the assertion in the State's introduction that the Ninth Circuit did not explain key aspects of its holding is erroneous and patently misleading. The Attorney General claims that the court "never explained why the state court ruling was 'unreasonable' in light of the acknowledged fact that counsel had relied on the opinion of the defense psychiatrist that respondent was simply a psychopath." (Cert. Pet. at 3.) Yet the Ninth Circuit in fact gave a detailed explanation of counsel's failure to give their expert the very same educational, medical and psychiatric records that the expert later reviewed and categorized as extensive mitigation.

The State also claims that the Ninth Circuit did not explain "why it was unreasonable for trial counsel to interview respondent and his mother and then present the mother's testimony regarding the circumstances of respondent's upbringing." (Cert. Pet. at 4.) But the Ninth Circuit certainly did explain why it is deficient to put on one witness whose testimony is "self-serving and misleading" because counsel did not interview any other witnesses and did not conduct an investigation of Pinholster's background that would have revealed that his mother

was not accurately portraying his troubled childhood nor her own contribution to his setbacks. (App. at 40, 42, 45, 49.)

The last and most misleading of the Attorney General's claims is that "the Ninth Circuit did not explain why the state court erred or acted unreasonably in rejecting [the] ineffective-assistance claim, given the strong aggravating evidence that respondent had committed two murders and had gloated about his life of violent crime while testifying at the guilt phase." On the contrary, the federal courts at every level, including the en banc panel, acknowledged the aggravated nature of the murders and conducted a re-weighing of the totality of mitigation versus aggravation, as required by *Terry Williams v. Taylor*, 529 U.S. 362 (2000). The court repeatedly acknowledged Pinholster's boastful testimony and demeanor at trial, and noted that a thorough investigation of his mental health would have helped counsel explain his inappropriate conduct at trial.

A more candid review of the Ninth Circuit's opinion reveals no new blazed trail of unsettled law. This was a bread-and-butter application of *Strickland v. Washington*, 466 U.S. 668 (1984) to a penalty phase in which counsel, by their own admission, did nothing to prepare due to their basic misunderstanding of the penalty phase. Past erroneous applications of *Strickland* that the Attorney General wants to impute to the Ninth Circuit have no application in this clear-cut

case of ineffective assistance at the penalty phase that does not warrant this Court's review.

STATEMENT OF THE CASE

Pinholster hosted a party to memorialize the death of a friend. He and many others at the party drank alcohol excessively and smoked marijuana. Pinholster asked guests David Brown and Art Corona if they wanted to help him burglarize the house of Steve Kumar, a local drug dealer. They agreed to participate and divide the loot evenly. Corona drove.

They first stopped at the home of Pinholster's friend Lisa Tapar to ask directions to Kumar's house. Pinholster pounded on the door. When Tapar answered, Pinholster told her he "had a message from God." Alarmed by Pinholster's appearance and behavior, Tapar and her friend slammed the door on him twice and refused to speak with him further. In response, Pinholster repeatedly stabbed a knife into their door and vandalized Tapar's car.

After this bizarre incident, Pinholster, Brown, and Corona went to Kumar's house, which was empty with the back door left unlocked. While Pinholster and his cohorts were ransacking Kumar's home, the two victims (one of whom worked for Kumar dealing drugs) unexpectedly entered the home through the front door and discovered the burglary. As Pinholster, Brown, and Corona attempted to exit

through the back door, the victims swiftly proceeded to the back yard to trap them. According to Corona, Pinholster went "totally crazy" and began stabbing one of the men as they approached him. Brown did the same to the second man. Pinholster stole the victims' wallets and eventually the three men divided the small amount of money and marijuana that was recovered from the robbery.

Wilbur Dettmar and Harry Brainard were appointed as Pinholster's counsel. They incorrectly believed that notice from the prosecution of intended evidence in aggravation necessarily predicated any investigative effort by the defense to uncover mitigating evidence. They did not conduct any investigation of mitigation evidence. Because they never personally received written notice, they concluded incorrectly that the case could not proceed to the penalty phase.[1]

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[1] The relevant statute states, "no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant, within a reasonable period of time as determined by the court, prior to trial." Cal. Pen. Code § 190.3 (West 1978). No court has ever precluded the prosecution from proceeding to penalty phase based on a lack of notice or late notice. See *People v. Howard*, 749 P.2d 279 (Cal. 1988) (holding that court's grant of continuance was sufficient to remedy lack of specific § 190.3 notice about aggravating evidence); *People v. Daniels*, 52 Cal. 3d 815, 879 (Cal. 1991)(no prejudice arises where the prosecutor gives § 190.3 notice even after trial has begun so long as notice is given as soon as the prosecutor becomes aware it is required); *People v. Cummings*, 850 P.2d 1 (Cal. 1993) (late § 190.3 note will not preclude admission of aggravating evidence in the absence of bad faith).

Nine weeks into trial, counsel retained forensic psychiatrist John Stalberg to interview Pinholster to ascertain his state of mind at the time of the homicides. Counsel provided Dr. Stalberg with a police report and a 1978 probation report. Although the State argues that counsel hired Dr. Stalberg to prepare for penalty, his appointment and examination occurred during the time-frame when counsel still believed that there would be no penalty phase for lack of statutory notice. Their lack of interaction with Dr. Stalberg and their failure to provide him with any educational, medical or psychiatric treatment records that he believes he requested further shows they were not focused on penalty at the time he conducted his evaluation. Based on his single, brief interview, Dr. Stalberg concluded that Pinholster was not mentally ill and sent counsel a report of his conclusions. Dr. Stalberg never heard back from trial counsel again.

Pinholster proceeded to trial. The prosecution relied heavily on Art Corona, who testified in exchange for having murder charges against him dropped. Corona testified that he watched in horror as Pinholster and Brown stabbed the victims and stole their wallets. The prosecution also elicited expert testimony that Pinholster's fingerprints were found inside the house and that a bloody boot print found outside the house matched the tread of Pinholster's boots.

With the approval of trial counsel, Pinholster testified in his own defense that he burglarized the house alone that evening and that afterward Corona requested the address so that Corona could burglarize the drug dealer's house later. The implication of Pinholster's testimony was that Corona had murdered the victims when he went to the house alone after Pinholster. Pinholster also testified that he could not have committed the robbery-murders, in which the victims had been stabbed to death, because he only used a gun during the "hundreds" of robberies of drug dealers he had committed over the years. The jury convicted Pinholster of two counts of capital murder.

After the verdicts were returned, trial counsel admitted in open court that they had not done anything to prepare for penalty because, as previously stated, they believed statutory notice had not been given. After a hearing, the judge held that Pinholster had received proper, timely § 190.3 notice of aggravating evidence before counsel were appointed, so he overruled the objection. The judge offered to continue the penalty phase for one week to give counsel time to prepare. Counsel inexplicably declined the offered continuance, noting that extra time "wouldn't make any difference." Counsel then spent 6.5 hours preparing for the penalty phase.

The prosecution called eight penalty witnesses, six of whom were law enforcement officers. A probation officer and several sheriffs recounted how Pinholster had on various occasions resisted arrest, fought with them or, in their opinion, faked epileptic seizures in order to avoid being arrested. A seventh witness testified that Pinholster attacked him with a razor. The prosecution called Pinholster's estranged wife to testify that Pinholster had broken her jaw, but she admitted that she thought he was having an epileptic seizure at the time.

Defense counsel's limited preparation resulted in an equally limited mitigation presentation. They waived opening statement. They called only one witness, Pinholster's mother Burnice Brashear. Brashear gave her opinion that she had always provided a good home and taken care of all of her children. She described Pinholster as very difficult and inaccurately portrayed his siblings as "basically good children."[2] She conceded that her husband, Bud Brashear, had been "abusive or near abusive" to Pinholster but characterized the physical abuse as "discipline" brought on by Pinholster. Then, she discounted the abuse entirely by stressing that Pinholster was presently on friendly terms with his stepfather.

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[2] In reality, Pinholster's older brother, Alvin, was a schizophrenic who at the time of his suicide was facing pending charges for armed residential burglary, forcible rape and forcible oral copulation. Pinholster's sister, Tammy, had clinical depression and had prior convictions for prostitution and forced oral copulation on a minor.

Brashear briefly mentioned two car accidents in which as a young child Pinholster was injured, but trial counsel made no attempt to explain the permanent impact of either accident on Pinholster. Brashear testified that elementary school officials had diagnosed her son with "perceptive vision," but claimed he "did much better" after being placed in a different classroom. Trial counsel made no effort to accurately present Pinholster's educational disabilities, explain his poor performance in school, nor to put into context his mother's obliviousness, indifference and complete inability to cope with Pinholster's educational disabilities. Brashear also testified that Pinholster suffered from epilepsy, but once again counsel failed to explain the impact of epilepsy on Pinholster.

During penalty arguments, the prosecutor emphasized the lack of mitigation. She argued Pinholster was "conwise" and had learned to fake seizures to minimize his culpability. She scoffed at defense counsel's fleeting evidence of epilepsy and head injuries, stressing, "There is no evidence . . . A doctor should have been brought in. Medical records or something." She also questioned the relevance of "discipline" imposed by Pinholster's stepfather, noting that Brashear's own testimony revealed that Pinholster "came from a good home," was "upper-middle class" and "had many things going for him." Finally, she asked, "[w]hat

mitigating circumstances were presented? Nothing except a mother who loves her son."

After two and one-half days of deliberations, the jury returned a death verdict.

STATE HABEAS

After his direct appeal was affirmed, Pinholster filed a state habeas petition alleging ineffective assistance at penalty. He alleged that trial counsel were ineffective for failing to investigate his mental health and his troubled childhood. (Res. App. 148-71.) He tendered the declaration of forensic psychiatrist George Woods. Dr. Woods diagnosed Pinholster with a mood disorder and "severe and longstanding seizure disorders." He found that Pinholster's mixed seizure history includes grand mal, complex partial and absence seizures. The complex partial seizures are significant because they include "repetitive and purposeless movements (automatisms), anger, rage outbursts, disturbances of intellect, hallucinations, involuntary movements, and other bizarre phenomena."

Dr. Woods traced the potential cause of Pinholster's epilepsy to "two known major head injuries" from two car accidents. Dr. Woods declared that "[t]hese two serious head injuries in early childhood imply a post-traumatic diagnosis [as the determinant cause of epilepsy], but a neurological assessment conducted in 1968

may provide grounds for a different etiology." Dr. Woods also declared, "[s]erious head trauma in early childhood may have been the precipitating factors for Scott's seizure disorder, but other causes cannot be ruled out." Dr. Woods buttressed his diagnosis of epilepsy by recounting numerous prior similar diagnoses and prescriptions for anti-seizure medications given by doctors who had examined Pinholster throughout his entire life.

Dr. Woods opined that during the homicides Pinholster's actions were the result of a mood disorder that caused him to engage in "psychotic and grandiose thinking" that interfered with his ability to premeditate and deliberate and prohibited him from forming intent to kill. Dr. Woods also opined that at the time of the stabbings Pinholster was suffering a "complex partial seizure" that caused "impaired consciousness and therefore the inability to form intent." Dr. Woods also noted that contrary to Burnice Brashear's trial testimony, Pinholster's siblings suffered from mental illness and had significant criminal histories.

The State in its reply did not provide any declarations from mental health experts rebutting Dr. Woods' opinions.

The state supreme court originally issued an order to show cause (OSC), but later withdrew it and summarily denied the petition without an evidentiary hearing. Although the Attorney General refers to "state procedures" in which the

court "provisionally assume[s] the truth of the factual allegations in the petition," the so-called "post-card" denial does not explain whether or which state procedures were followed, what facts the court considered, what law the state applied, what facts the state disregarded, why the OSC order was granted then withdrawn, nor why the petition was denied. (App. 13, 302.)

FEDERAL HABEAS

Pinholster raised the same ineffective-assistance claim in a federal habeas petition, once again emphasizing trial counsel's failure to investigate his mental health problems and troubled childhood. He again tendered the declaration of Dr. Woods and added the declaration of trial counsel's guilt-phase mental health expert, Dr. Stalberg. (Res. App. 1-64.) Stalberg declared that trial counsel only gave him certain police reports and an old probation report. (Res. App. 218-20.)

In preparation for the federal habeas petition Dr. Stalberg was provided and reviewed for the first time all of Pinholster's educational, medical and psychiatric records. He concluded that there was "voluminous mitigating evidence," including "repeated head trauma, evidence of brain damage," "a childhood of physical abuse, emotional neglect, and a family history of mental illness and criminal behavior." Dr. Stalberg also believed that Pinholster's epilepsy was potentially mitigating because "epileptics are more sensitive to drugs," and "have

difficulty controlling their behavior, and are prone to abnormal behavior between seizures." (Res. App. 218-20.) The petition alleged that if counsel had provided Dr. Stalberg with full information about Pinholster's history and his conduct during and just prior to the offenses, Dr. Stalberg would have concluded that Pinholster's conduct was influenced by "severe genetic and organic mental disorders," "repeated head trauma," and "evidence of brain damage."[3]

With the district court's permission, Pinholster later augmented his ineffective-assistance claim with the declarations of forensic psychiatrist Sophia Vinogradov and pediatric neurologist Donald Olson. Although the State in its cert. petition refers to the additional declarations as interjecting "facts radically different than those [Pinholster] presented to the state court," the doctors' declarations contained no new facts and no new bases for their diagnoses. (Cert. Pet. at 11.)

Dr. Vinogradov relied on all of the same facts as Dr. Woods, ultimately concluding that Pinholster suffered from "personality change -- aggressive type,

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[3] In an abundance of caution, Pinholster filed a second state habeas petition to obviate any argument that he failed to exhaust the failure-to-prepare-the-mental-health-expert aspect of his IAC penalty claim. Thus, the Stalberg declaration and the related allegations about trial counsel's failure to properly prepare him for the forensic psychiatric examination were presented to the state court. As with the first state petition, the California Supreme Court summarily dismissed the claim on the merits in a post-card denial. (App. 300-301.)

due to serious childhood head trauma." (Res. App. 176-217, 221-50.) Consistent with Dr. Woods and Dr. Stalberg's declarations, Dr. Vinogradov noted that as a young child Pinholster had suffered trauma to his head during two car accidents that resulted in brain damage, the probable cause of his epilepsy. Dr. Vinogradov like Woods and Stalberg corroborated her diagnosis with 1968 medical tests performed on Pinholster, at age nine, that revealed an "abnormal EEG with changes consistent with underlying seizure activity." Dr. Vinogradov noted as well that in 1968 doctors had prescribed Dilantin, an anti-seizure medication, three times per day. She like Dr. Woods also noted that Pinholster's siblings had a history of mental illness and significant criminal histories.

Dr. Vinogradov concluded that brain damage affected Pinholster's "precortical functioning" resulting in "further deterioration in functioning during times of increased demand or psychosocial stress" and severely limiting his "attentional capacities, impulse control, learning abilities, social-emotional processing, and ability to handle anger and aggression." Dr. Vinogradov opined that Pinholster's organic personality syndrome affected his behavior during the homicides:

> On the night of the crimes, while intoxicated on multiple substances, Mr. Pinholster experienced perceptual aberrations and possible psychotic symptoms. This

> disinhibited, perceptually altered, and severely compromised mental state was superimposed on a man who already had extremely poor impulse control and a tendency to aggressive outbursts due to the long-term effects of childhood head trauma. This was added to a genetic predisposition for affective instability and a lifetime of socialization into violent and chaotic behavior. During his confrontation of the victims, this confluence of factors resulted in Mr. Pinholster's absolute loss of behavioral control and resulted in the crimes of which he was convicted.

Dr. Olson opined that Pinholster's brain damage and resulting seizure disorder were most likely caused by the severe head trauma he had experienced during one of the car accidents. (Res. App. 172-75.)

Pinholster also submitted declarations from family members and a teacher who contradicted his mother's testimony with information about his deprived and neglectful childhood. Several family members testified that Pinholster's maternal grandmother and his stepfather physically abused him as a young child. The stepfather's beatings were particularly severe, including beating Pinholster with a paddle about the head and hitting him with a with a two-by-four board. They also declared that he and his siblings went hungry and lacked sufficient clothing while his mother bought expensive clothes and went out on dates. His teacher declared that he did poorly in school, talked to himself and had no friends at school. Pinholster's mother took no steps to help him after the teacher advised her

that she thought he had mental problems. At age 11, he was confined to a mental institution for 4 months.

Confronted with the state court's unexplained refusal to hold a hearing despite a clear prima facie showing of ineffective assistance at penalty, the district judge, Hon. Gary Taylor, granted an evidentiary hearing on this issue. The State claims that the district court did not apply AEDPA. (Cert. Pet. at 8.) After *Woodford v. Garceau*, 538 U.S. 202 (2003) changed the law of the Ninth Circuit, Judge Taylor revisited his original order and issued a second order explicitly stating that he had granted a hearing and analyzed the claims under AEDPA standards. At the hearing, Pinholster called Drs. Vinogradov and Olson, who testified consistently with their declarations. The Attorney General called Drs. Stalberg and Rudnick. Dr. Stalberg persisted in his original determination that Pinholster was antisocial, but he conceded that at the time of his interview with Pinholster he was not provided the necessary records to determine the nature and extent of Pinholster's mental health history which he now categorizes as "voluminous mitigation." The Attorney General introduced Dr. Rudnick, who was also a new expert at the federal hearing testified that Pinholster was not brain damaged. (App. 129.)

After the hearing, the district court found that Pinholster's head trauma caused him to develop epilepsy and related mental deficits. The district court also determined that Burnice Brashear had significantly misrepresented the abuse and neglect that Pinholster had suffered as a child. Weighing the new mitigation against the totality of the aggravation, Judge Taylor held that the California Supreme Court's application of *Strickland* was objectively unreasonable and granted relief.

In an 8-3 en banc opinion, authored by Judge Milan Smith, the Ninth Circuit affirmed. While the dissent found that the district court misapplied AEDPA and did not defer to the state court's summary denial of the claim, the majority found that the district judge properly granted a hearing, complied with AEDPA and correctly concluded that the state court was objectively unreasonable in denying Pinholster's ineffective-assistance claim at penalty.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE WARDEN EXAGGERATES THE DIFFERENCES BETWEEN PINHOLSTER'S ALLEGATIONS IN STATE COURT AND HIS ALLEGATIONS AND PROOF IN FEDERAL COURT

A. While Pinholster changed experts between state and federal courts, the core facts and legal theories remained the same.

There is no denying that Pinholster and the State added mental health

experts after the case transitioned from state court to the federal court and ultimately relied on those new experts at the evidentiary hearing. But under habeas law, the emphasis is on the operative facts and the legal theories, not which particular person is called to testify as an expert witness. A comparison of the substance of these experts' opinions and their similar bases for diagnoses shows that nuances in medical terminology have been greatly overstated by the Attorney General as differences of opinion.

1. In state court, Pinholster alleged that trial counsel were ineffective for failing to prepare and present mental health and social history as mitigation.

From the beginning of the post-conviction proceedings, Pinholster repeatedly and consistently alleged that trial counsel's failure to prepare and present evidence of his mental health problems and troubled childhood resulted in ineffective assistance at penalty phase. The first state petition (filed Aug. 16, 1993) alleged that Pinholster suffered from "profound mental disorders" and "serious mental impairments throughout his life." The petition specifically pleaded "head traumas during early childhood" as one of the causes for his mental disorders and impairments. Counsel tendered Dr. Woods' declaration more thoroughly discussing Pinholster's childhood head injuries and opining that he

suffered from both mood and seizure disorders that affected his ability to form specific intent and control his actions during the offenses. (Res. App. 221-50.)

The second state petition (filed August 29, 1997) alleged that Dr. Stalberg "failed to alert trial counsel that [Pinholster's] organic disorders provided a mental state defense" to the charged offenses and aggravators. The petition also alleged that Pinholster's "mental disorders" mitigated the crimes for a variety of reasons. (Res. App. 65-147.) In support, counsel tendered the declaration of Dr. Stalberg, who stated that he had made his initial diagnosis without having received any of the educational, medical and psychiatric treatment records that he had requested from counsel. (Res. App. 218-20.) Dr. Stalberg also declared that counsel did not inform him that shortly before the homicides, Pinholster had gone to a friend's house wielding a knife and claiming he had "a message from God." After reviewing all of the social history records and learning all the relevant facts on the night of the crimes, Dr. Stalberg opined that there was a wealth of mitigation to be offered at trial, including "epilepsy," "severe genetic and mental disorders," "repeated head trauma," and "evidence of brain damage." Thus, Pinholster did allege and support with declarations in state court the facts that his trial counsel failed to investigate and present evidence of his organic disorders and brain damage.

2. In federal court, Pinholster alleged that trial counsel were ineffective for failing to prepare and present mental health and social history as mitigation.

Although the Attorney General has built his certiorari strategy around the notion that Pinholster completely changed his ineffective-assistance strategy when he moved from state to federal court, the reality is that the state petitions contained all of the same operative facts and legal theories as presented in federal court. The only differences were minor and the natural result of taking live testimony subject to cross examination. Just as he had in the state proceeding, Pinholster emphasized in federal court that his trial counsel had unreasonably failed to thoroughly investigate his mental state at the time of the homicides in the face of several red flags of serious mental health problems. Just as in state court, the mental health experts identified two serious head injuries during early childhood as the probable cause of Pinholster's longstanding and severe epilepsy. And just as in state court, the experts opined that the cognitive deficits associated with epilepsy negatively affected Pinholster's state of mind and conduct at the time of the offenses. While Dr. Woods referred to the "synergistic" effect of substance abuse, mood disorder and seizures and Dr. Vinogradov referred to the "confluence" of substance abuse, brain damage-related impairments and seizures, both focused on how the combination of impairments robbed Pinholster of the

ability to control his behaviors and form specific intent at the time of the homicides. The fact that different experts used different but related nomenclature to talk about the same operative facts in support of the same legal theories does not fundamentally alter the claim or violate AEDPA in any way.

B. Once a federal hearing was granted, each side presented some new evidence that had not been presented in state court.

The Attorney General emphasizes every conceivable change in Pinholster's case by mechanically highlighting every nuance of psychiatric diagnoses. Yet, variants in the State's own case, new experts, strategy shifts, brand-new arguments in federal court, are far more conspicuous.

In state court, the Attorney General failed to tender any mental health expert declarations. Once the case proceeded to federal court, the State called Dr. Rudnick to opine about the cause of Pinholster's epilepsy. The State also called Dr. Stalberg as a witness at the federal hearing having never submitted his declaration in state court. Dr. Stalberg stood by his diagnosis but also testified to defense counsel's failure to discover "voluminous mitigation." Judge Taylor, who saw and heard the witnesses testify, ultimately found Pinholster's experts to be more persuasive. But the State's ultimate failure does not diminish the reality that

it tried to convince the court otherwise with two new experts it had not introduced in state court.

During the federal evidentiary hearing, the Attorney General also offered a completely new and different explanation for trial counsel's incompetence at penalty phase, that Pinholster had told counsel not to offer any mitigation at trial. (App. 117.) The district judge rejected this contention for lack of evidence. Yet it is another example of the Attorney General's changed strategy and variable evidence from state to federal court.

What is sauce for the goose is sauce for the gander. Pinholster's strategy and claim never wavered. The bases of his experts' opinions remained the same from state to federal court. But in any event it would be unfair to penalize Pinholster for conduct the State engaged in during the course of the litigation.

It is important to note that the Ninth Circuit held that even without the new experts' testimony it would have found an unreasonable application of *Strickland* based on trial counsel's failure to prepare and present evidence of Pinholster's troubled childhood. (App. at 69.) The State's only response is to argue that the majority must not be telling the truth, but, as set forth directly below, counsel's failure to investigate the defendant's troubled childhood is a classic basis for ineffective assistance at penalty.

II. THE CIRCUIT COURT CORRECTLY APPLIED THE *WILLIAMS-WIGGINS-ROMPILLA* LINE OF CASES TO THE SPECIFIC FACTS OF THIS CASE.

A. The Circuit did not plow any new ground.

There is nothing cert-worthy about the federal court's grant of penalty relief in this case. The federal court simply applied the definitive test for ineffective assistance set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). The circuit court relied on the well-known trilogy of AEDPA cases applying *Strickland* to penalty claims, See *Terry Williams v. Taylor*, 529 U.S. 362 (2000), *Wiggins v. Smith*, 539 U.S. 510 (2003) and *Rompilla v. Beard*, 545 U.S. 374 (2005).

The State's cert petition relies heavily on 10 per curiam summary dispositions (not so identified in its table of authorities)[4] but virtually ignores the *Williams-Wiggins-Rompilla* line. The State cites *Terry Williams* once in support of a procedural argument, and completely ignores *Wiggins* and *Rompilla*. The omission is telling. If the important federal question raised by this case is how to apply *Strickland* in the AEDPA era to counsel's duty to prepare and present

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[4] Summary dispositions do not carry the same precedential effect as opinions decided after full briefing and argument. *Hohn v. United States*, 524 U.S. 236, 251 (1998) ("[W]e have felt less constrained to follow precedent where, as here, the opinion was rendered without full briefing and argument."); *Gray v. Mississippi*, 481 U.S. 648, 651, no.1 (1987) ("The Court, of course, at times has said that summary action here does not have the same precedential effect as does a case decided upon full briefing and argument.").

mitigation, it is inconceivable that one would omit this Court's most relevant and timely IAC penalty cases that were decided after full briefing and argument.

In *Terry Williams*, the defendant contacted the police, who incorrectly believed that the elderly victim had died of blood alcohol poisoning, and admitted hitting him with a mattock in the chest. Williams had prior convictions for armed robbery, burglary, grand larceny and unadjudicated criminal activities, including two auto thefts and two violent assaults on elderly victims. He lured the first victim out of his house by starting a fire and attacked and robbed him. He beat the second victim so badly that she was in a permanent vegetative state.

Trial counsel started investigating mitigation one week before trial. They called Williams' mother and two neighbors, all of whom testified that the defendant was non-violent and a "nice boy." Counsel also introduced evidence that during a prior robbery Williams removed the bullets from his gun so he would not injure the victims.

Williams alleged his counsel were ineffective for failing to prepare and present evidence that he is "borderline mentally retarded," suffered "repeated head injuries," and had "mental impairments organic in origin." He also alleged that he suffered substantial abuse and deprivation as a child. The state court held an evidentiary hearing and issued a written opinion finding no prejudice. This

Court found that the state court's denial of the ineffective-assistance claim was an objectively unreasonable application of *Strickland.*

In *Wiggins*, the defendant, who had no prior record, was convicted of murdering an elderly woman, whose body was found in the bathtub with her panties pulled down and insecticide sprayed all over her face. At penalty phase, trial counsel limited their penalty defense to a showing that Wiggins was not a principal in the offense. 539 U.S. at 553.

Wiggins alleged that trial counsel were ineffective for failing to prepare and present evidence that he had limited intellectual abilities, was raised by an alcoholic and abusive mother, and was sexually abused by his caretakers while in foster care. 539 U.S. at 516-17. The state court held an evidentiary hearing and issued a written opinion finding that counsel's performance was not deficient because they made a tactical decision to retry the facts in lieu of presenting mitigation. Once again, this Court found that the state court's denial of the ineffective assistance claim was objectively unreasonable.

In *Rompilla*, the defendant was convicted of the murder of a barkeeper, whose body was found in the bar with multiple stab wounds and burned. Rompilla had prior convictions for rape, burglary and theft, arising from a factually similar attack on a female barkeeper. At penalty phase, counsel called

five family members, who claimed residual doubt and begged for mercy. Counsel also called Rompilla's teenage son, who testified that he loved his father and would visit him in prison.

Rompilla alleged that trial counsel were ineffective for failing to prepare and present evidence that he had organic brain damage caused by fetal alcohol syndrome and was borderline mentally retarded. He also alleged that they failed to review a court file for a prior conviction that would have revealed that he was raised by two alcoholic parents who neglected and physically abused him during childhood and that he became an alcoholic as an adult. The state court held an evidentiary hearing and issued a written opinion finding that counsel's performance was not deficient. Yet again, this Court found that the state court's denial of his ineffective-assistance claim was an objectively unreasonable application of *Strickland*.

B. The Ninth Circuit correctly held that trial counsel's failure to prepare and present mitigation is ineffective assistance under the *Williams-Wiggins-Rompilla* line.

Comparing Pinholster's case to this trilogy demonstrates that the circuit court simply followed this Court's most recent and relevant case law on the duty to prepare and present mitigation evidence at the penalty phase. The murders in *Terry Williams*, *Wiggins* and *Rompilla* were every bit as aggravated, if not more,

than the murders in this case. Each victim was significantly more vulnerable than the two victims in this case. Although Wiggins was a first-offender, Williams and Rompilla had violent priors rivaling if not exceeding Pinholster's self-reported criminal history, even if his boastful testimony is taken at face value.

Each of the trial counsel in the trilogy of cases did far more to prepare for penalty phase than trial counsel in this case. By their own admission in open court, Dettmar and Brainard did nothing to prepare prior to the guilt verdicts. They then declined an offered continuance which could have helped them recover from their total lack of preparation. They called Pinholster's mother because she was the only witness they had talked to, not because of any strategy reasons, as the Attorney General suggests. The results were disastrous. She testified under the delusion that she had provided her son with discipline and a good home then added that her son was essentially incorrigible and justly deserved the harshest of punishments even as a small child. The prosecutor even used her testimony to argue that there was no mitigation.

The mitigation uncovered by habeas counsel in this case is qualitatively and quantitatively similar to the uncovered mitigation in *Terry Williams*, *Wiggins* and *Rompilla*. Pinholster presented a combination of mental impairments related to epilepsy and brain damage and a severely troubled childhood that closely tracks

Terry Williams. As the Court in *Terry Williams* noted, the mental impairments were especially important because "his violent behavior was a compulsive reaction rather than the product of cold-blooded premeditation." *Id.* at 398.

Rather than honestly grappling with the disconnect between its argument and the *Williams-Wiggins-Rompilla* line, the State sets up a straw-man to knock down. It argues that the Ninth Circuit, based on the ABA guidelines, created a "rigid and hindsight ineffective-assistance rule" that compels counsel in every case to present "bad childhood" evidence, and then correctly notes that such a Procrustean rule would conflict with *Strickland*, which eschews hard and fast rules for proper representation. See cert pet. at 25-26. This is an obvious attempt at capitalizing on *Bobby v. Van Hook*, 130 S.Ct. 13 (2009) (per curiam), where this Court summarily reversed the Sixth Circuit for holding that counsel must comply with the 2003 ABA Guideline for the Appointment and Performance of Defense Counsel in Death Penalty Cases. But the Ninth Circuit did not inflate the importance of the ABA guidelines and it certainly did not create a per se rule that evidence of a bad childhood must be presented. Rather it used the more general 1982 ABA Standards in effect at the time of trial and stressed, "we make clear, as the Supreme Court has, that such standards do not define reasonable

representation, but rather are 'guides to determining what is reasonable.'" App. at 38, quoting *Strickland*, 466 U.S. at 688.

Throughout the petition, there is an undercurrent of dissatisfaction with what the Attorney General views as the Ninth Circuit's refusal to defer to the state-court adjudication of the ineffective-assistance claim. The State argues that "this case is another in a long and growing line of cases in which the Ninth Circuit has failed to review state court determinations deferentially." (Cert. Pet. at 11.) There is no acknowledgment, however, that the "state procedures" for adjudicating a claim give the federal courts little, if any direction, about what to defer to.[5] The California Supreme Court held no hearing, originally issued an OSC and then withdrew it for unknown reasons, and finally issued a post-card denial of the petition with no discussion of any factual findings or legal

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[5] The State's invocation of an AO report on the cost of federal evidentiary hearings as a reason to defer to its "state procedures" is ironic. A recent National Center for State Courts publication observed, "California's system of post-conviction review seems designed to punt responsibility for constitutional review to the federal courts." J. Gould, *Justice Delayed or Justice Denied? A Contemporary Review of Capital Habeas Corpus*, 29 Justice System Journal 273, 282 (2008). The report explains that from 1978 to 2005, the California Supreme Court issued post-card denials in 92% of the habeas cases it reviewed, and noted, "[t]hese summary dispositions provide no explanation or details for the court's holding, thus giving the federal courts nothing to consider besides the decision itself in weighing the constitutional merit of the defendant's later federal petition." *Id.*

conclusions that precipitated that decision.

AEDPA deference does not require the federal courts to turn a blind eye to unreasonable decisions that result from such a flawed process. As this Court noted in *Miller-El v. Cockrell*, 537 U.S. 322 (2003): "Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence." *Id.* at 340. The Attorney General's understanding of AEDPA deference as set forth in his petition cannot be correct. The state courts in *Terry Williams*, *Wiggins* and *Rompilla* each held extensive evidentiary hearings and issued written opinions explaining why penalty relief was denied. Yet, this Court found each state court's denial of the *Strickland* claim to be objectively unreasonable. The state decision here is similarly unreasonable.

III. THE WARDEN'S INTERPRETATION OF § 2254(d)(1) CONFLICTS WITH THIS COURT'S LEADING CASES AND WOULD RENDER ALL FEDERAL HEARINGS MEANINGLESS.

The State repeatedly argues that a habeas petitioner cannot present any new evidence in federal court because only evidence presented in state court is relevant to assessing the reasonableness of the state court's adjudication of his

claims. While exhaustion law has always limited a petitioner's federal claims, there has never been a wholesale prohibition on the presentation of any new evidence in federal court, as the State now urges.

Prior to AEDPA, this Court rejected a similar argument by the California Attorney General that a petitioner was barred from presenting any additional evidence in federal court in support of a claim that had been denied by the state court. *See Vasquez v. Hillery*, 474 U.S. 254, 260 (1986). The Court held that because he had not received a full and fair hearing in state court on his grand jury discrimination claim, Hillery was permitted to present a statistical expert and additional declarations on the same claim in federal court.

Seeking to avoid *Vasquez*, the State argues that AEDPA applies the comity rules of exhaustion law, which give a state the first chance to consider a constitutional claim, to prohibit the consideration of any new evidence in federal court under any section of AEDPA even when the state court does not hold a full and fair hearing.

Michael Williams v. Taylor, 529 U.S. 420 (2000) reveals that AEDPA authorizes a federal evidentiary hearing, particularly when the state court did not hold one. In *Michael Williams*, the petitioner did not know of or raise his claims of juror bias, prosecutorial misconduct and a *Brady* violation until he filed his

federal habeas petition. The district court ordered an evidentiary hearing on the claims. The state argued that § 2254(e)(2) prohibited holding a federal hearing on these claims because the petitioner had "failed to develop" them in state court. This Court found that the term "failed to develop" referred to a lack of diligence and remanded for an evidentiary hearing the claims for which the petitioner had tried diligently to develop in state court. The Court noted, "Diligence will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law." *Id.* at 437.

Vasquez and *Michael Williams* show that the State's petition for certiorari employs an inaccurate reading of the law regarding federal evidentiary hearings in order to fabricate an important question. While a state court should be given the first opportunity to hold a hearing on habeas claims meriting a hearing, the federal court is not always barred from holding a hearing, particularly if the state court improperly limited the petitioner's right to prove a fact-bound claim such as ineffective assistance. This is exactly what happened in the instant case. Pinholster alleged ineffective assistance based on the failure to prepare and present mental health testimony and evidence of his deprived, neglectful upbringing. He requested an evidentiary hearing on his ineffective-assistance claim. The California Supreme Court summarily denied the claim in a post-

cardcard denial that contains no discussion of why the claim was denied. Just as in *Vasquez* and *Michael Williams*, the federal court granted a hearing in the wake of a wrongful denial of a hearing by the state court. Just as the petitioners in *Vasquez* and *Michael Williams*, Pinholster ultimately proved his claim once he was afforded an evidentiary hearing.

AEDPA should reward a state that makes reasonable efforts to clarify facts and provide a reasoned decision for its adjudication of habeas claims. But under the Attorney General's reading of AEDPA, a state is rewarded when it shifts all costs of fact-gathering to federal courts and then lays down the federalism, finality, and comity cards to keep the facts distorted.[6]

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[6] At least one senator has observed that the California Supreme Court's post-card denials require the federal courts to start each California capital habeas case "from scratch" and "seem determined to thwart the intentions of AEDPA and shift costs to the federal government by requiring the federal courts to do the work that the state system should complete." When questioned by Senator Diane Feinstein, California Supreme Court Chief Justice Ronald George admitted that the post-card-denial procedure is a deliberate effort to save the state court's time and resources. J. Gould, *Justice Delayed or Justice Denied? A Contemporary Review of Capital Habeas Corpus*, 29 Justice System Journal 273, 282 (2008); See also Senator Diane Feinstein's website, http://feinstein.senate.gov/05releases/r-habeas.htm; A. Alarcon, *Remedies for California's Death Row Deadlock* , 80 S. Cal. L. Rev. 697,742 (2007).

A. Section 2254(d)(1) does not limit the petitioner to the state-court record.

The habeas statute itself undermines the State's argument that the reasonableness of the state court's determination is limited to the state-court record.

Under AEDPA, a petitioner who attacks a state court's legal holding must demonstrate that the court's decision is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1). A petitioner who attacks factual findings must demonstrate that the state-court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). The omission of the phrase "in light of the evidence presented in the State Court proceeding" in § 2254(d)(1), juxtaposed with its inclusion in § 2254(d)(2), suggests that Congress intended to treat post-conviction attacks on legal holdings differently than attacks on factual findings. See *Bates v. United States*, 522 U.S. 23, 39-30 (1997) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally in the disparate inclusion or exclusion."). The two § 2254(d) subsections, read as a whole, reveal

that a habeas petitioner attacking a state-court legal holding under § 2254(d)(1)--which is exactly what Pinholster did when he attacked the state court's finding of no ineffective assistance--- is not limited to the state-court record.

The State tries to escape the plain language of the statute by selectively quoting from *Holland v. Jackson*, 542 U.S. 649 (2004) (per curiam). In *Holland*, the Court refused to consider the affidavit of Martha Gooch, who impeached the prosecution's star eyewitness, in analyzing an ineffective-assistance claim because the affidavit had never been presented to the state court. The Court wrote, "[i]in this and related contexts we have made clear that whether a state court's decision was unreasonable must be assessed in light of the record the court had before it." *Id.* at 652. But a complete reading of *Holland* makes it clear that the Court refused to consider Gooch's affidavit because the defendant never explained why he had not presented her testimony at the two-day evidentiary hearing in state court, resulting in finding that the defendant was not diligent. Citing *Michael Williams*, the Court stressed, "[u]nder the habeas statute, Gooch's statement could have been the subject of an evidentiary hearing by the District Court, but only if [the defendant] was not at fault in failing to develop that evidence in state court." *Id.* at 652-53. This shows that the Court was simply applying traditional AEDPA principles, not radically restricting the analysis of reasonableness in all §

2254(d)(1) claims to solely what was presented in state court.

The Court in *Michael Williams* had good reason to give federal courts flexibility to hold an evidentiary hearing, so long as the district judge stays properly focused on whether or not the petitioner acted diligently in presenting his claims in state court. Where, as in *Holland*, the state court gives the petitioner a full and fair hearing to prove his claim, it may well be difficult for him to establish the requisite diligence to justify a further hearing in federal court. But where, as here, the state court denies the petitioner's request for a hearing on a fact-bound claim such as ineffective assistance and summarily dismisses the petition, the petitioner may very well be able to establish the diligence necessary to obtain a federal hearing.

B. This Court had never held that a petitioner must first demonstrate an objectively unreasonable application of federal law under § 2254(d)(1) in order to receive a federal evidentiary hearing under § 2254(e)(2).

The State faults the district court for holding an evidentiary hearing without first concluding that the California Supreme Court acted unreasonably in summarily dismissing Pinholster's ineffective-assistance claim. The State does not, and cannot, cite one case in which this Court held that a determination that a state court's adjudication of a claim was objectively unreasonable under §

2254(d)(1) is a prerequisite to receiving a federal evidentiary hearing. *Michael Williams* certainly does not say that. Nor would such a requirement make any sense.

Indeed, if a petitioner could demonstrate without any further fact development that the state court's denial of his claim was objectively unreasonable, what need would he have for a federal evidentiary hearing? The petitioner would be entitled to relief on the present record. This is the fundamental flaw of the State's unorthodox reading of AEDPA. The interpretation, if accepted, would require every habeas petitioner to actually win his case before being entitled to receive an evidentiary hearing on it. AEDPA does not compel such a nonsensical result.

C. The warden's novel reading of § 2254(d)(1) renders § 2254(e)(2) meaningless.

This Court in *Schriro v. Landrigan*, 550 U.S. 465, 468 (2007), stated that AEDPA does not alter a district court's discretion to hold an evidentiary hearing if a hearing is not barred by 28 U.S.C. § 2254(e)(2). The State's reading of § 2254(d)(1) would render § 2254(e)(2) superfluous. Under § 2254(e)(2), a petitioner who "failed to develop the factual basis of a claim in State court proceedings" cannot receive a federal hearing absent specific circumstances set

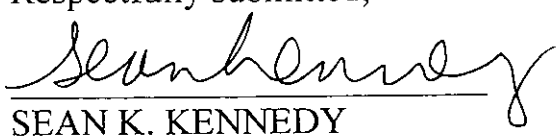
forth in subsections (A) and (B). But according to the State, § 2254(d)(1) already imposes a wholesale prohibition on federal evidentiary hearings because its analysis of unreasonableness is strictly limited to the existing state-court record. If this reading of § 2254(d)(1) were true, there simply would be no need for further explicit limitations on the right to an evidentiary hearing in federal court. Congress' inclusion of § 2254(e)(2) in AEDPA and this Court's case law interpreting the provision refutes the Attorney General's interpretation of § 2254(d)(1).

CONCLUSION

The Attorney General has pursued a certiorari strategy that misportrays this case as involving new and unorthodox interpretations of AEDPA with sweeping importance to federal habeas. In fact, the decision in this case turned on a rather ordinary application of the law on ineffective assistance at the penalty phase under the famous trilogy of Supreme Court cases. The petition for a writ of certiorari should be denied.

Respectfully submitted,

DATED: May 12, 2010



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